A

WONG KIONG HUNG & ANOR

v.

CHANG SIEW LAN & ANOTHER APPEAL

B

COURT OF APPEAL, PUTRAJAYA
LOW HOP BING JCA
HELILIAH MOHD YUSOF JCA
VINCENT NG JCA
[CIVIL APPEAL NOS: J-02-116-03 & J-02-148-2003]

C

23 APRIL 2009

LAND LAW: *Sale and purchase of property - Solicitor - Purchaser's solicitor paid balance purchase price to vendors' solicitor - Vendors' solicitor absconded with money - Whether vendors' solicitor agent of*

D

vendors - Whether vendors vicariously liable for their solicitor - Whether purchaser's solicitor liable to purchaser in tort of negligence or for breach of contractual duty - Terms and conditions of sale and purchase agreement

CONTRACT: *Sale and purchase of property - Solicitor - Purchaser's solicitor paid balance purchase price to vendors' solicitor - Vendors'*

E

solicitor absconded with money - Whether vendors' solicitor agent of vendors - Whether vendors vicariously liable for their solicitor - Whether purchaser's solicitor liable to purchaser in tort of negligence or for breach of contractual duty - Terms and conditions of sale and purchase agreement

F

LEGAL PROFESSION: *Duty of care - Solicitors - Sale and purchase of property - Purchaser's solicitor paid balance purchase price to vendors' solicitor - Vendors' solicitor absconded with money - Whether vendors' solicitor agent of vendors - Whether vendors vicariously liable for their solicitor - Whether purchaser's solicitor liable to purchaser in tort of*

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negligence or for breach of contractual duty - Terms and conditions of sale and purchase agreement

The first appeal was by the first and second defendants against the decision of the High Court judge ordering them to return to

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the plaintiff RM309,683.51 paid under a sale and purchase agreement dated 20 October 1998 ('SPA'), while the second appeal was by the plaintiff against the dismissal of her claim against the third defendant, an advocate and solicitor. The first and second defendants ('vendors') were the registered owners of

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a house ('property') that was charged to Delta Finance Bhd. The vendors, *vide* the SPA, sold the property to the plaintiff

('purchaser') at a consideration of RM275,000. The vendors were represented by solicitor Lim Jit Liang, who was then practising as M/s J.L. Lim & Co ('vendors' solicitor'), and the purchaser was represented by the third defendant ('purchaser's solicitor'). Upon execution of the SPA, the purchaser, through her solicitor, paid the deposit sum of RM27,500 to the vendors' solicitor. On 10 December 1998, the purchaser subsequently paid the balance purchase price to her solicitor. The purchaser's solicitor then paid the sum (after some deductions) *vide* cheque to the vendors' solicitor, who acknowledged receipt thereof. The payment was made pursuant to the undertaking by the vendors' solicitor to redeem the property from Delta Finance. However, this cheque was dishonoured and the property was never redeemed. The vendors' solicitor, who had absconded with the money, could not be located. To date, the property had not been transferred to the purchaser. Around July 2000, Delta Finance commenced foreclosure proceedings against the property and obtained an order for sale. The property was subsequently sold by public auction. On 18 November 2002, the High Court made the aforesaid orders that were now the subject matter of the two appeals. In the first appeal, the following issues required determination: (i) on the agreed facts, whether the vendors' solicitor was the agent of the vendors; and (ii) if so, whether the vendors were vicariously liable for their solicitor. For the second appeal, the following question required consideration: (1) whether, upon a true construction of cls. 2, 4 and 15 of the SPA, the purchaser's solicitor was liable to the purchaser in the tort of negligence or for breach of contractual duty when the purchaser's solicitor delivered the balance purchase price *vide* the cheque, made payable to the vendors' solicitor who, instead of honouring the undertaking to discharge the existing charge pursuant to the SPA, had absconded with the balance purchase price and was now nowhere to be found.

Held (dismissing both appeals)
Per Low Hop Bing JCA delivering the judgment of the court:

(1) On the capacity of an agent, it was noteworthy that the SPA expressly stated that the vendors had appointed J.L. Lim & Co as their solicitor to whom the vendors had paid the fees and costs. A solicitor who has been retained by his client and whose fees and costs are paid by his client is in law and in fact the agent of the client. Clause 15 of the SPA manifested

A an express and irrevocable authority given by the vendors to their solicitor to accept the money payable pursuant to the SPA to utilise it to discharge the existing charge over the property, and to act for and deal with all matters pertaining to the transaction in order to give effect to the terms and
B conditions in the SPA, especially the requirement to discharge the existing charge over the property through the vendors' solicitor. On the facts and the law, the answers to (i) and (ii) were in the affirmative. *Kuldip Singh & Anor v. Lembaga Letrik Negara & Anor* (foll). (paras 16, 17, 18 & 19)

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(2) The contractual duty of the purchaser's solicitor was to be found in cls. 2, 4 and 15 of the SPA and read conjunctively, they did not impose any contractual obligation or duty on the purchaser's solicitor to effect payment of the balance purchase
D price to the chargee directly. It was abundantly clear that the payment of the balance purchase price was to be made to the vendors' solicitor and at the office of the vendors' solicitor. The purchaser's solicitor had complied with these clauses. In the process of effecting payment of the balance purchase price
E by the purchaser's solicitor to the vendors' solicitor pursuant to the provisions of the SPA, there was no evidence of any wrongful act or omission on the purchaser's solicitor's part. On the facts, no negligence could be imputed to the purchaser's solicitor. The facts also did not reveal any conflict
F of interest. The balance purchase price was actually released to the person to whom it was intended *ie*, the vendors' solicitor, who was specifically appointed by the vendors in the SPA. There was nothing in the agreed facts to render the disappearance of the vendors' solicitor reasonably foreseeable.
G The purchaser's solicitor should not be made liable for the wrongful act of the vendors' solicitor, who had failed to honour his undertaking and who had absconded with the balance purchase price. Therefore, the purchaser's solicitor should not be held liable to the purchaser in negligence or for
H breach of contractual duty. The answer to (1) was in the negative. (paras 36, 37, 38, 39, 40, 43 & 44)

(3) On the foregoing grounds, the trial judge was justified and correct in making the aforesaid orders. (para 45)

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Bahasa Malaysia *Translation Of Headnotes*

Rayuan pertama ialah oleh defendan-defendan pertama dan kedua terhadap keputusan hakim Mahkamah Tinggi yang mengarahkan mereka memulangkan kepada plaintif RM309,683.51 yang dibayar di bawah suatu perjanjian jual beli bertarikh 20 Oktober 1998 ('SPA'), sementara rayuan kedua ialah oleh plaintif terhadap tolakan tuntutannya terhadap defendan ketiga, seorang peguambela dan peguamcara. Defendan-defendan pertama dan kedua ('penjual') merupakan pemilik berdaftar sebuah rumah ('harta') yang digadai kepada Delta Finance Bhd. Penjual, *vide* SPA itu, menjual harta itu kepada plaintif ('pembeli') pada balasan sebanyak RM275,000. Penjual diwakili oleh peguamcara Lim Jit Liang, yang berkhidmat sebagai M/s J.L. Lim & Co ('peguamcara penjual'), dan pembeli diwakili oleh defendan ketiga ('peguamcara pembeli'). Selepas SPA dilaksanakan, pembeli, melalui peguamcaranya, membayar jumlah deposit sebanyak RM27,500 kepada peguamcara penjual. Pada 10 Disember 1998, pembeli kemudiannya membayar baki harga belian kepada peguamcaranya. Peguamcara pembeli selepas itu membayar jumlah itu (selepas beberapa potongan) *vide* cek kepada peguamcara penjual, yang mengakui penerimaannya. Bayaran itu dibuat mengikut akujanji peguamcara penjual untuk menebus harta itu daripada Delta Finance. Walau bagaimanapun, cek itu tidak dilayani dan harta itu tidak pernah ditebus. Penjual peguamcara, yang melarikan diri dengan duit itu, tidak dapat dijumpai. Sampai hari ini, harta itu belum lagi dipindahmilik kepada pembeli. Pada kira-kira Julai 2000, Delta Finance memulakan prosiding penutupan terhadap harta itu dan memperolehi satu perintah jual. Harta itu selepas itu dijual secara lelong awam. Pada 18 November 2002, Mahkamah Tinggi membuat perintah yang tersebut sebelumnya yang kini menjadi isi kedua-dua rayuan ini. Dalam rayuan pertama, isu-isu berikut perlu diselesaikan: (i) berdasarkan fakta-fakta yang disetujui, sama ada peguamcara penjual ialah agen penjual; dan (ii) jika begitu, sama ada penjual mempunyai liabiliti perwakilan bagi peguamcara mereka. Bagi rayuan kedua, soalan berikut perlu dibicara: (1) sama ada, atas tafsiran betul klausa-klausa 2, 4 dan 15 SPA, peguamcara pembeli mempunyai liabiliti kepada pembeli dalam tort kecuaian atau untuk kemungkiran kewajipan kontraktual apabila peguamcara pembeli menyampaikan baki harga belian *vide* cek, yang sepatutnya dibayar kepada peguamcara penjual yang, sebaliknya, dari melayani akujanji untuk melepaskan gadaian yang masih ada mengikut SPA, telah melarikan diri dengan baki harga belian itu dan sekarang tidak dapat dijumpai di mana-mana pun.

Diputuskan (menolak kedua-dua rayuan)
Oleh Low Hop Bing HMR menyampaikan penghakiman mahkamah:

(1) Berkenaan dengan keupayaan seseorang agen, ia patut diberi perhatian bahawa SPA secara nyata mengatakan bahawa penjual telah melantik J.L. Lim & Co sebagai peguamcara mereka dan telah membayar fee dan kos kepadanya. Seorang peguamcara yang telah diambil sebagai retainer oleh kliennya dan fee dan kosnya dibayar oleh kliennya ialah dalam undang-undang dan dalam fakta agen klien itu. Klausa 15 SPA menunjukkan suatu kuasa nyata dan tidak dapat dibatalkan yang diberi oleh penjual kepada peguamcara mereka untuk menerima wang yang mesti dibayar mengikut SPA dan menggunakannya untuk melepaskan gadaian yang masih wujud di atas harta, dan untuk melakukan dan mengedalikan semua perkara yang terlibat dengan transaksi itu supaya memberi efek kepada terma dan syarat dalam SPA, terutamanya keperluan untuk melepaskan gadaian yang masih wujud di atas harta itu melalui peguamcara penjual. Berdasarkan fakta-fakta dan undang-undang, jawapan kepada (i) dan (ii) ialah afirmatif. *Kuldip Singh & Anor v. Lembaga Letrik Negara & Anor* (diikuti).

(2) Kewajipan kontraktual peguamcara pembeli boleh dijumpai dalam klausa-klausa 2, 4 dan 15 SPA dan dibaca bersama, mereka tidak mengenakan apa-apa obligasi kontraktual atau kewajipan ke atas peguamcara pembeli untuk membuat bayaran baki harga belian kepada pemegang gadaian secara terus. Ia amat jelas bahawa bayaran baki harga belian sepatutnya dibuat kepada peguamcara penjual dan di pejabat peguamcara penjual. Peguamcara pembeli telah mematuhi semua klausa-klausa ini. Dalam proses membuat bayaran baki harga belian oleh peguamcara pembeli kepada peguamcara penjual mengikuti peruntukan-peruntukan SPA, tidak ada keterangan apa-apa perbuatan salah atau peninggalan oleh peguamcara pembeli. Atas fakta, tiada apa-apa kecuaian yang boleh dikaitkan kepada peguamcara pembeli. Fakta-fakta juga tidak mendedahkan apa-apa percanggahan kepentingan. Baki harga belian sebenarnya dilepaskan kepada orang yang dimaksudkan, iaitu, peguamcara penjual, yang dilantik dengan spesifik oleh penjual dalam SPA. Tidak ada apa-apa dalam fakta-fakta yang disetujui untuk membuat kehilangan peguamcara penjual sesuatu yang boleh

diramal dengan munasabah. Peguamcara pembeli tidak seharusnya dijadikan bertanggungjawab untuk perbuatan salah peguamcara penjual, yang telah gagal menghormati akujanjinya dan yang telah melarikan diri dengan baki harga belian. Oleh itu, peguamcara pembeli tidak seharusnya dijadikan bertanggungjawab kepada pembeli dalam kecuaian atau untuk kemungkiran kewajipan kontraktual. Jawapan kepada (1) ialah negatif.

(3) Atas alasan-alasan yang disebut di atas, hakim perbicaraan berjustifikasi dan betul dalam membuat perintah-perintah yang tersebut sebelumnya.

Case(s) referred to:

Abu Bakar Ismail & Anor v. Ismail Husin & Ors & Other Appeals [2007] 3 CLJ 97 ***(refd)***

Country Personel (Employment Agency) Ltd v. Alan R Pulver & Co (A Firm) [1987] 1 All ER 289 ***(refd)***

Duchess of Argyll v. Beuselinck [1972] 2 Llyod's Rep 172 ***(refd)***

Edward Wong Finance Co v. Ltd V Johnson Stokes & Master (A Firm) [1984] 1 AC 296 ***(refd)***

Fong Maun Yee & Anor v. Yoong Weng Ho Robert (practicing under the name and style of Yoong & Co) [1997] 2 SLR 297 ***(refd)***

Groom v. Crocker [1938] All ER 394 ***(refd)***

Kuldip Singh & Anor v. Lembaga Letrik Negara & Anor [1982] 1 LNS 73 HC ***(foll)***

Lai Foh & Sons Sdn Bhd v. Skrine & Co [2001] 3 CLJ 185 HC ***(refd)***

Lamphier v. Phipos [1883] 8 Car ***(refd)***

Maelstrom Resources Sdn Bhd & Anor v. Shearn Delamore & Co And Another Case [2007] 1 CLJ 50 HC ***(refd)***

Midland Bank Trust Co Ltd and Another v. Hett, Stubbs & Kemp (A Firm) [1978] 3 All ER 571 ***(refd)***

Messrs Yong & Co v. Wee Hood Teck Development Corp Ltd [1984] 1 CLJ 353; [1984] 1 CLJ (Rep) 251 FC ***(refd)***

Neogh Soo Oh & Ors v. G Rethinasamy [1983] 2 CLJ 218; [1983] CLJ (Rep) 663 HC ***(refd)***

Nocton v. Lord Ashburton [1914-15] 2 All ER 267 ***(refd)***

Simmons v. Pennington & Son (A Firm) [1955] 1 All ER 240 ***(refd)***

Swamy v. Matthews & Anor [1967] 1 LNS 174 ***(refd)***

For the appellants - M/s Adi Radlan & Co
For the respondents - M/s John Ang & Jega

[Appeal from High Court, Johor Bahru; Suit No: 22-629-1999]

Reported by Suresh Nathan

A

JUDGMENT

Low Hop Bing JCA:

Introduction

B **[1]** The two appeals before us are best tabulated as follows:

Appeal No & Appellants	Order Appealed Against
1. J-02-116-03 Wong Kiong Hung and Wong Kieng Sing (the first and second defendants in the High Court)	The first and second defendants were ordered to return to the plaintiff RM309,683.51 paid under the sale and purchase agreement dated 20 October 1998 ("the SPA"), with damages to be assessed, interest and costs.
2. J-02-148-2003 Chang Siew Lan (the plaintiff in the High Court)	The plaintiff's claim against the third defendant, an advocate and solicitor, practising as C.T. Loh & Co, was dismissed with costs.

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F **[2]** By consent of the parties herein, these two appeals are heard together.

Agreed Facts

[3] The first and second defendants ("the vendors") were the G registered owners of a double storey semi-detached house in Senai, Johor ("the property"). The property was charged to Delta Finance Berhad ("Delta Finance"). *Vide* the SPA, the vendors sold the property to the plaintiff ("the purchaser") at a consideration of RM275,000. The completion date was 20 January H 1999. The vendors were represented by solicitor Lim Jit Liang, who was then practising as M/s J.L. Lim & Co. ("the vendors' solicitor"). The purchaser was represented by the third defendant ("the purchaser's solicitor").

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[4] Upon execution of the SPA, through her solicitor, the purchaser paid the deposit sum of RM27,500 to the vendors' solicitor.

[5] The redemption sum payable to Delta Finance was RM248,748.92, while the balance of the purchase price was RM247,500.00 ("the balance purchase price"). The vendors had paid the differential sum of RM1,248.92 to their solicitor.

[6] On 10 December 1998, *vide* BBMB cheque No. 759769, the purchaser paid the balance purchase price to her solicitor. On 14 December 1998, the purchaser's solicitor paid a sum of RM247,316.49 (after some deductions) *vide* BBMB cheque No: 429422 dated 15 December 1998, made payable to the vendors' solicitor who had acknowledged receipt thereof on 16 December 1998. The payment was made pursuant to the undertaking by the vendors' solicitor to redeem the property from Delta Finance.

[7] However, the cheque issued by the vendors' solicitor for RM248,748.92 towards payment of the redemption sum to Delta Finance was dishonoured. The property was never redeemed. The vendors' solicitor, who had absconded with the money, could not be located.

[8] To date, the property has not been transferred to the purchaser.

[9] Around July 2000, Delta Finance commenced foreclosure proceedings against the property and obtained an order for sale. The property was subsequently sold by public auction.

[10] On 18 November 2002, the Johor Bahru High Court made the aforesaid orders which are now the subject matters of the two appeals.

Return Of RM309,685,51

[11] This is the subject matter in Appeal No. 1.

[12] Learned counsel Mr Adi Radlan submitted for the vendors that the learned trial judge had erred in holding that the vendors were vicariously liable for the wrongful act of their solicitor who had absconded with the money.

[13] The contention advanced by learned counsel Mr R. Jayabalan for the purchaser was that the vendors' solicitor acting for the vendors in the SPA was their agent when the balance purchase price was forwarded to the vendors' solicitor and that was as good as having been paid to the vendors themselves, notwithstanding the failure on the part of the vendors' solicitor to hand over the money to the chargee to redeem the property.

[14] The learned trial judge sustained the purchaser's contention and held the vendors vicariously liable for their solicitor.

[15] In the light of the decision of the High Court and the respective counsel's contentions under this head, the questions to be determined are:

(1) On the above agreed facts, is the vendors' solicitor the agent of the vendors? and

(2) If the answer to question (1) is in the affirmative, are the vendors vicariously liable for their solicitor?.

[16] On the capacity of an agent, it is noteworthy that the SPA expressly stated that the vendors had appointed J.L. Lim & Co. as their solicitor to whom the vendors had paid the fees and costs. A solicitor who has been retained by his client and whose fees and costs are paid by his client is in law and in fact the agent of the client: see *Abu Bakar Ismail & Anor v. Ismail Husin & Ors & Other Appeals* [2007] 3 CLJ 97.

[17] Clause 15 of the SPA manifests an express and irrevocable authority given by the vendors to the their solicitor to accept the money payable pursuant to the SPA, to utilise it to discharge the existing charge over the property and to act for and deal with all matters pertaining to the transaction in order to give effect to the terms and conditions in the SPA, especially the requirement to discharge the existing charge over the property through the vendors' solicitor. For completeness, cl. 15, where relevant, is reproduced below:

> Cl. 15. The vendor shall discharge the existing Charge over the said Property from the existing Chargee … through the Vendor's Solicitors … and for the purpose the Vendor hereby irrevocably authorizes the Vendor's Solicitors to utilise such part of the purchase price paid by the Purchaser as redemption money for discharging the existing Charge … over the said Property.

[18] A substantially similar situation arose in *Kuldip Singh & Anor v. Lembaga Letrik Negara & Anor* [1982] 1 LNS 73. There, the client purchased a house and instructed solicitor Brar to prepare a sale and purchase agreement. The client had taken a loan. He appointed the solicitor to whom the cheque for the loan had been issued in order to redeem the house from the chargee. However, the solicitor disappeared with the loan sum and never redeemed the house. Wan Hamzah J (later SCJ) held that the solicitor was the agent of the client. Hence, the client was ordered to bear the loss of the loan.

[19] On the facts and the law, the answers to both the above questions are in the affirmative.

Negligence And Breach Of Contract

[20] For this subject matter in Appeal No 2, the purchaser founded her action against her solicitor on negligence or breach of contractual duty.

[21] It was submitted by Mr. R. Jayabalan for the purchaser that:

(1) The purchaser's solicitor owed the purchaser a duty of care in tort or in contract to act with reasonable care, skill and diligence in protecting the purchaser's interest by all proper means to achieve the objective of the retainer, and to register the property in the purchaser's name; and

(2) The conduct of the plaintiff's solicitor had fallen below the standard of care required in protecting the purchaser's interest, when the purchaser's solicitor made payment of the cheque favouring vendors' solicitor, instead of Delta Finance, thereby putting the vendors' solicitor in control of the money and to abscond with it.

[22] Learned counsel Mr. C.Y. Chok contended for the purchaser's solicitor that the purchaser's solicitor had acted reasonably and competently in delivering the cheque, made payable to the vendors' solicitor, pursuant to cls. 2, 4 and 15 of the SPA, in particular the undertaking by the vendors' solicitor to use the balance purchase price to discharge the charge on the property ("the undertaking") and to complete the sale and purchase.

[23] The learned trial judge held that the act of the purchaser's solicitor in delivering the cheque, made payable to the vendors' solicitor, is consistent with that of an average prudent solicitor, in the exercise of reasonable degree of care and skill based on events in prospect and not in retrospect.

[24] In my view, the issue for determination under this head may be formulated as follows:

> Upon a true construction of clauses 2, 4 and 15 of the SPA, is the purchaser's solicitor liable to the purchaser in the tort of negligence or for breach of contractual duty when the purchaser's solicitor delivered the balance purchase price *vide* the cheque, made payable to the vendors' solicitor who, instead of honouring the undertaking to discharge the existing charge pursuant to the SPA, had absconded with the balance purchase price and is now nowhere to be found?.

[25] The two separate and distinct causes of action, founded on the tort of negligence and the breach of contractual duty respectively, are substantially and closely connected. They are also overlapping. Hence, they may appropriately be dealt with together.

[26] It is imperative to hark back to first principles by setting out the respective ingredients or elements of these causes of action, with particular reference to solicitor-client relationship.

[27] To succeed in the tort of negligence against the solicitor, it is incumbent on the client to establish that:

(1) the solicitor owes the client a duty of care;

(2) there is a breach of that duty by the solicitor;

(3) the client has thereby suffered damage; and

(4) the damage is not too remote a consequence of the breach.

(See eg, *Maelstrom Resources Sdn Bhd & Anor v. Shearn Delamore & Co And Another Case* [2007] 1 CLJ 50 HC, per Kang Hwee Gee J (now JCA)).

[28] For the purpose of establishing a breach of contractual duty against the solicitor, the client must prove:

(1) the existence of a contractual relationship which expressly or impliedly imposes a contractual duty on the solicitor;

(2) there is a breach thereof by the solicitor;

(3) the client has thereby suffered damage; and

(4) the damage is not too remote a consequence of the breach.

[29] Practical illustrations which set out principles governing the tort of negligence, and the breach of contractual duty, may be distilled from decided cases, as follows:

(1) A man or a woman who practises a profession is bound to exercise the care and skill of an ordinary competent practitioner in that profession – be it the profession of … a solicitor or otherwise: *Swamy v. Matthews & Anor* [1967] 1 LNS 174 FC, per Barakbah LP (as he then was) at p. 139, applying *Lamphier v. Phipos* [1883] 8 Car & p. 475: 173 ER 581 where Tindal CJ laid down this principle:

> Every person who enters into a learned profession undertakes to bring to the exercise of it a reasonable degree of care and skill. He does not undertake, if he is an attorney, that at all events you shall gain your case, … nor does he undertake to use the highest degree of skill … but he undertakes to bring a fair, reasonable and competent degree of skill. (See also Lord Fullerton in *Cooks v. Falconer's Representatives* [1850] 13D, p. 157, at p. 172);

(2) Per Oliver J in *Midland Bank Trust Co. Ltd and Another v. Hett, Stubbs & Kemp (A Firm)* [1978] 3 All ER 571 HC:

(2.1) In relation to a breach of contractual duty, solicitors are not liable under a general retainer since the extent of a solicitor's duties to his client depends on the terms and limits of his retainer. There is no such thing as a "general retainer" of a solicitor in the sense of a solicitor being under a duty to consider all aspects of his client's interests generally when consulted by the client about a particular aspect of a problem;

(2.2) In relation to the tort of negligence, under the general law, the solicitor-client relationship gives rise to a duty on a solicitor to exercise that care and skill on which he knows that his client would rely, and to a duty not to injure his client by failing to do that which he had undertaken to do and which, at the solicitor's invitation, the client had relied on him to do. A solicitor's failure eg, to register an option to purchase the freehold reversion of a farm (as an estate contract under the (UK) Land Changes Act 1925) constitutes a breach of professional duties to exercise reasonable care and skill;

(2.3) There is no rule of law which confines a solicitor's duty to his client under his retainer to a contractual duty alone; nor is there any rule of law which precludes a claim in tort for breach of a duty to use reasonable care and skill if there is a parallel contractual duty of care;

(3) A client may bring an action against his solicitor in contract, based on the retainer or in tort, or in both: *Noction v. Lord Ashburton* (1914-15) 2 All ER 267, 281 and *Midland Bank Trust Company Limited, supra*. As regards the obligations arising out of the retainer, a solicitor's duty is to use reasonable care and skill in giving such advice and taking such action as the facts of a particular case demand. The standard of care is that of the reasonably competent solicitor and the duty is directly related to the confines of the retainer. The exact scope of the solicitor's duty to protect his client's interest is difficult to define but according to Scott LJ, in *Groom v. Crocker* [1938] All ER 394, 413, a solicitor should at least "carry out his instructions in the matters to which the retainer relates, by all proper means. It is an incident of that duty that the solicitor shall consult with his client on all questions of doubt which do not fail within the express or implied discretion left to him, and shall keep the client informed to such an extent as may be reasonably necessary … .

(4) Per Syed Agil Barakhbah J (later SCJ) in *Messrs Yong & Co v. Wee Hood Teck Development Corp Ltd* [1984] 1 CLJ 353; [1984] 1 CLJ (Rep) 251 FC:

(4.1) A retainer may come into existence by implication and amplified by the conduct of the parties which shows a course of dealings giving rise to legal obligations and establishing the solicitor-client relationship, thereby putting into operation the normal terms of the contractual relationship including in particular the duty of the solicitors to protect the interest of the client in matters to which the retainer relates by all proper means;

(4.2) While the duty of a solicitor is directly related to the confines of the retainer, it is the incident of that contractual duty that he has to consult his client on all questions of doubt which do not fail within the express or implied discretion left to him; and to keep his client informed to such extent as may be necessary according to the same criteria;

(4.3) A common solicitor, acting for two different clients whose interests are directly in conflict, acts at his own peril and the onus of showing that the conflicting interests did not prevent him from doing his duty to both clients rests firmly on him;

(4.4) The solicitor's failure to perform his obligation under the contract with the required skill and care constitutes a breach of contractual duty, while the solicitor's failure to exercise reasonable care and skill renders the solicitor liable in the tort of negligence;

(5) Per Karthigesu JA in *Fong Maun Yee & Anor v. Yoong Weng Ho Robert (practising under the name and style of Yoong & Co)* [1997] 2 SLR 297 CA Singapore:

(5.1) A solicitor owes his client a duty of care to verify the instructions to act in the sale of property, instead of merely acting on the strength of a company's resolution and option which turn out to be forgeries;

(5.2) The extent of the legal duty in a given situation is a question of law;

(5.3) The solicitor's failure, to verify the instructions to act, clearly gives rise to a foreseeable risk that the solicitor would be acting without authority. This risk could have

A been avoided by the solicitor taking steps to confirm his authority to act or, if the solicitor could not have done so, to at least warn the client of the risk that he could have been acting without proper authority, as he could not confirm his instructions to act. The solicitor, who
B took no such avoiding action before proceeding to act in the sale, does not meet up to the standard of a reasonably competent conveyancing solicitor in Singapore, being in breach of his duty of care and skill;

C (6) A solicitor's failure to use reasonable care and skill in giving his advice and taking such action as the facts of the case demand of a normally competent and careful practitioner in a sale and purchase of land, such as making a search at or an enquiry with the land office relating to the
D acquisition of the land under the Land Acquisition Act 1960, renders the solicitor liable for breach of contractual duty and in tort, which is quite independent of contract, as a professional man professing special skill who gives assistance to another and owes a duty of care to that
E other person who to his knowledge relies on his skill: per Gunn Chit Tuan J (later CJ (M)) in *Neogh Soo Oh & Ors v. G Rethinasamy* [1983] 2 CLJ 218; [1983] CLJ (Rep) 663 HC;

F (7) Per Mohd Noor Ahmad J (later FCJ) in *Lai Foh & Sons Sdn. Bhd v. Skrine & Co.* [2001] 3 CLJ 185 HC:

(7.1) The practice of conveyancing work requires a high degree of skill and caution on the part of solicitors for the purpose of protecting their clients' interest against
G possible fraud or forgery. On the plaintiff's purported letter of authorization which was forged and which the solicitor had not sought verification, the release by the solicitor of land titles to a third party who had no right to receive them, is an act which falls well below the
H standards expected of a prudent conveyancing solicitor, both for breach of contractual duty and for negligence;

(7.2) In determining whether the duty of care imposed upon a solicitor should extend to ensure that a third party
I wrongdoer does not commit tortious acts against the victim of an original act of negligence, the court has to strive neither unjustifiably to deprive the client of

remedies for the injuries nor unjustifiably impose too heavily a legal responsibility on the solicitor. The former is in the nature of public interest and the latter is of personal interest. Having balanced the conflicting interests, public interest must prevail in this case;

[30] Other illustrations of professional negligence include:

(1) The solicitor's failure to alert the client in relation to the effect of an unusual clause in a lease and the risks inherent in entering into such a lease: *Country Personel* (*Employment Agency) Ltd v. Alan R Pulver & Co (A Firm)* [1987] 1 All ER 289 CA; and

(2) The solicitor's failure to explain and make aware to the client of the protracted litigation he was likely to encounter should he decide to act on the solicitor's advice: *Maelstrom Resources Sdn. Bhd & Anor, supra.*

[31] It needs to be observed that the aforesaid authorities had established liability against the solicitor in negligence or for breach of contractual duty or both, on the basis of the solicitor's wrongfulness or omission such as:

(1) failure to register an option under the (UK) Land Charges Act 1925: *Midland Bank Trust & Co. Ltd, supra*;

(2) acting as a common solicitor for two different clients whose interests are directly in conflict: *Yong & Co, supra*;

(3) failure to verify the authority to act, but merely relying on forged company resolution and option: *Fong Maun Yee & Anor, supra*;

(4) unauthorised release of land titles to a third party who has no right to receive them and who subsequently committed forgery in relation thereto: *Lai Foh & Sons Sdn Bhd, supra*;

(5) failure to alert the client in relation to the effect of an unusual clause in a lease: *Country Personnel (Employment Agency) Ltd, supra*; and

(6) failure to explain and make aware to the client of protracted litigation: *Maelstrom Resources Sdn Bhd & Anor, supra.*

[32] In *Edward Wong Finance Co Ltd v. Johnson Stokes & Master (A Firm)* [1984] 1 AC 296 PC, the clients instructed solicitors to act in a mortgage transaction. The solicitors carried out a land search against the property which revealed charges in favour of a bank. The solicitors forwarded the purchase price to the vendor's solicitor on an undertaking by the vendor's solicitor to forward to the purchaser's solicitors, within a specified period, the relevant documents of title duly executed. On the basis of the undertaking, the purchaser's solicitors sent to the vendor's solicitor cheques drawn by the plaintiffs in his favour. Without honouring his undertaking, the vendor's solicitor left Hong Kong with the money. In the first instance, the Hong Kong Supreme Court held, *inter alia*, that the purchaser's solicitors were negligent, having failed to exercise due care, skill and judgment in the performance of the duty to take reasonable steps to protect the plaintiffs' interest. On appeal, the Court of Appeal reversed that decision. On further appeal, the Privy Council restored the Supreme Court decision, and held that:

(1) the risk of loss to the plaintiffs by placing the money at the disposition of the vendor's solicitor was a foreseeable risk of embezzlement by him;

(2) the risk could have been avoided by taking precautions to ensure that the plaintiffs would have an unanswerable claim against the other side for specific performance of that party's obligations, and in the case of property already subject to a mortgage which was to be discharged so much of the purchase price as was needed to discharge the prior mortgage could have been paid by cheque in favour of the mortgagee or its duly authorized agent and not by cheque in favour of the vendor's solicitor; and

(3) without taking precautions, when they knew the property was subject to an existing mortgage, the purchaser's solicitors had failed to exercise the standard of care which they owed to the plaintiffs and, accordingly, they were negligent.

[33] *Edward Wong Finance Co. Ltd, supra*, which the purchaser herein relied on heavily, is concerned with the standard of care owed by a solicitor to his client in relation to mortgage of property pursuant to the conveyancing practice prevalent in Hong Kong. The advice of the Privy Council was delivered in the context of the tort of negligence arising from the solicitors' failure to exercise

due care, skill and judgment in the performance of their duty to take reasonable steps to protect their client's interest. Conspicuously, the facts before the Privy Council are somewhat dissimilar.

[34] The provisions of cls. 2, 4 and 15 which fall to be considered herein, are not within the purview of consideration by the Privy Council. These contractual provisions are crucial for consideration by this court, especially in relation to the issues of negligence or breach of contractual duty or both. Further, the purchaser herein had already obtained judgment against the vendors. In the circumstances, with the utmost respect, the factual matrix in *Edward Wong Finance Co. Ltd, supra*, is readily distinguishable from the facts before this court.

[35] In Malaysia, as alluded to above, where a solicitor accepted a sum of money in the capacity of the solicitor for his client, so as to utilise it to redeem the property, but had instead absconded with it, the client was ordered to bear the loss: per Wan Hamzah J (later SCJ) in *Kuldip Singh & Anor, supra*.

[36] The contractual duty of the purchaser's solicitor is to be found in cls. 2, 4 and 15 of the SPA. Clause 15 has been referred to and considered earlier in this judgment.

[37] Clauses 2 and 4 provide as follows:

> 2. The sum stated in Section 9 of the Schedule hereto being the balance of the purchase price shall be paid by the Purchaser and the purchase completed at the office of the Solicitors stated in Section 14(a) of the Schedule hereto (hereinafter called "the Vendor" in the manner and at the time(s) started in Section 10 of the Schedule hereto ("the date of the completion").
>
> 3. ...
>
> 4. Upon full payment of the purchase price by the Purchaser, the Vendor shall do everything necessary to transfer the said Property or cause to procure the same to be transferred to the Purchaser or his nominee(s) as the Purchaser shall absolutely decide.

[38] Read conjunctively, cls. 2, 4 and 15 do not impose any contractual obligation or duty on the purchaser's solicitor to effect payment of the balance purchase price to the chargee directly. It is abundantly clear that the payment of the balance purchase price is to be made to the vendors' solicitor and at the office of the vendors' solicitor. The purchaser's solicitor had complied with these clauses.

[39] In the process of effecting payment of the balance purchase price by the purchaser's solicitor to the vendors' solicitor pursuant to the provisions of the SPA, there was no evidence of any wrongful act or omission on the part of the purchaser's solicitor. On the facts, no negligence can be imputed to the purchaser's solicitor. The facts also do not reveal any conflict of interest. The balance purchase price was actually released to the person to whom it was intended ie the vendors' solicitor who was specifically appointed by the vendors in the SPA. There is nothing in the agreed facts to render the disappearance of the vendors' solicitor reasonably foreseeable.

[40] The purchaser's solicitor should not be made liable for the wrongful act of the vendors' solicitor. It was the vendor's solicitor who had failed to honour his undertaking. It was the vendor's solicitor who had absconded with the balance purchase price.

[41] In *Simmons v. Pennington & Son (A Firm)* [1955] 1 All ER 240 CA, both the High Court and the Court of Appeal concurrently held that where the advice given by the solicitors was in accordance with the general conveyancing practice which had prevailed for a long time, the solicitors were not negligent, in particular where the consequences could not reasonably have been foreseen and were too remote. It is so easy to be wise after the event. One has to try to put oneself in the position of the solicitor at the time and see whether the solicitor had failed to come up to a reasonable standard of care and skill such as is rightfully required of an ordinary prudent solicitor. It is impossible to say that a solicitor is guilty of a breach of duty to his client when it was one of those misadventures and misfortunes which do sometimes happen even in the best-conducted businesses: per Denning LJ (later MR) at p. 243.

[42] In *Duchess of Argyll v. Beuselinck* [1972] 2 Llyod's Rep. 172 HC, it was held that in this world, there are few things that could not have been better done if done with hindsight. The advantages of hindsight include the benefit of having a sufficient indication of which of the many factors present are important and which are unimportant. But hindsight is no touchstone of negligence. The standard of care to be expected of a professional man must be based on events as they occur, in prospect and not in retrospect. The duty of care is not a warranty of perfection: per Megarry, J at p. 185.

[43] The purchaser's solicitor should not be held liable to the purchaser in negligence or for breach of contractual duty.

[44] The answer to the above question is in the negative.

Conclusion

[45] On the foregoing grounds, the learned trial judge is justified and correct in making the aforesaid orders. The appeals, by the first and second defendants and by the plaintiff respectively, are devoid of merits and are hereby dismissed with costs. The orders of the High Court are affirmed. Deposit to the respective successful party on account of taxed costs.

[46] My learned colleagues, Heliliah Mohd Yusof and Vincent Ng Kim Khoay, JJCA have read this judgment in draft and have expressed their agreement with it to become the judgment of the court.